

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
AIR FLEX CUSTOM FURNITURE, INC. AND EMIL ZAMBARDI, AS OFFICER ON REMAND	:	DETERMINATION
	:	DTA NO. 807485
for Revision of Determinations or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period March 1, 1985 through February 29, 1988.	:	

Petitioners, Air Flex Custom Furniture, Inc. and Emil Zambardi, as officer, 361 Rockaway Avenue, Valley Stream, New York 11581, filed a petition for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 1985 through February 29, 1988.

A hearing was held before Joseph W. Pinto, Jr., Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on September 17, 1990, at 2:45 P.M., with all briefs to be filed by December 14, 1990. Petitioners appeared by Lawrence R. Cole, C.P.A. The Division of Taxation appeared by William F. Collins, Esq. (Vera R. Johnson, Esq., of counsel).

On September 12, 1991, the Tax Appeals Tribunal remanded the case to the same Administrative Law Judge for further analysis of the issue set forth below.

ISSUE

Whether the evidence of mailing submitted by the Division of Taxation established the date that the notices of determination and demands for payment of sales and use taxes due were issued.

FINDINGS OF FACT

The Division of Taxation issued to both petitioners, Air Flex Custom Furniture, Inc. ("Air Flex") and Emil Zambardi, as officer, six notices of determination and demands for

payment of sales and use taxes due. The three notices sent to Air Flex were mailed to its address at 361 Rockaway Avenue, Valley Stream, New York 11581 and the three identical notices of determination and demands for payment of sales and use taxes due sent to Emil Zambardi, as officer of Air Flex, were mailed to his home address at 100-127 Baker Court, Island Park, New York 11518. The notices sent to Air Flex set forth the following:

<u>Notice Number</u>	<u>Date of Notice</u>	<u>Total Tax Due</u>	<u>Penalty</u>	<u>Interest</u>	<u>Total</u>
S890127327C	1/27/89	\$38,667.64	\$10,349.46	\$9,601.62	\$58,618.72
S890127328C	1/27/89	0	3,836.37	3,836.37	
S890127329C	1/27/89	0	7,502.16	0	7,502.16

As stated above, three notices were also sent to Emil Zambardi, officer of Air Flex Custom Furniture, Inc., which set forth the following information:

<u>Notice Number</u>	<u>Date of Notice</u>	<u>Total Tax Due</u>	<u>Penalty</u>	<u>Interest</u>	<u>Total</u>
S890127330C	1/27/89	\$38,667.64	\$10,349.46	\$9,601.62	\$58,618.72
S890127331C	1/27/89	0	3,836.37	0	3,836.37
S890127332C	1/27/89	0	7,502.16	0	7,502.16

These notices were issued to both petitioners following an audit of the books and records of Air Flex and each of the notices indicates that the tax assessed was estimated in accordance with the provisions of Tax Law § 1138(a)(1). Petitioners conceded receipt of the notices (Tr. 25-26).¹

Previously, on or about September 18, 1988, the Division of Taxation issued three statements of proposed audit adjustment to Air Flex in care of its former representative, one Anthony Grosso, C.P.A., the first of which indicated additional tax due of \$38,667.64 plus penalty and interest to be computed, the second, penalty of \$3,836.37 and the third, penalty of \$7,502.16.

On December 10, 1988, petitioners' then representative, Anthony Grosso, C.P.A., submitted a request for a conciliation conference. On January 12, 1989, a letter was sent by the Bureau of Conciliation and Mediation Services to Anthony L. Grosso acknowledging his

¹This last sentence is an addition to original Finding of Fact "1".

request for conciliation conference but deeming the request premature. The letter went on to explain the following:

"However, this request was deemed premature. The Tax Law requires that, to be timely, a request must be filed within ninety days after the mailing of a Notice of Deficiency (or Determination) by the Audit Division. Our records show that neither document has yet been mailed.

Therefore, this matter has not yet reached a deficiency stage and you may be able to resolve this controversy with the Audit Division. You should immediately contact the issuing office indicating your disagreement with their 'proposed adjustments'."

Petitioners' representative, Mr. Grosso, did not file another request for conciliation conference until May 12, 1989.

On July 21, 1989, the Bureau of Conciliation and Mediation Services issued a Conciliation Order dismissing petitioners' request for the conciliation conference indicating that a request must be filed within 90 days of the date of the statutory notice. The order explained that since the notices were issued on January 27, 1989, but the request was not mailed until May 12, 1989, or in excess of 90 days, the request was filed too late and the request for a conciliation conference had to be denied.

The Division of Taxation had on file a power of attorney appointing Anthony L. Grosso, C.P.A., of Grosso, Golub and La Capra, P.C., 2 Roosevelt Avenue, Port Jefferson Station, New York 11776, as the representative for Air Flex for sales tax during the periods March 1, 1985 to "present", presumably the date of the power, April 25, 1988. The power was executed but not dated by Emil Zambardi, president of Air Flex Custom Furniture, Inc. and was signed and stamped by a notary public, Marilyn Berkowitz, on April 25, 1988. It was also signed by Anthony L. Grosso, C.P.A. In the acknowledgment, the notary public failed to properly fill in the date on which Emil Zambardi came before her, his corporate office or the county of execution. However, at hearing, Emil Zambardi indicated that he was indeed president of the corporation and that he did recall signing the power of attorney before Marilyn Berkowitz on the date next to her name, April 25, 1988. Mr. Zambardi did not state that he ever revoked Mr. Grosso's power of attorney prior to March 2, 1990, when he executed a new power on behalf of Air Flex to Lawrence Cole, C.P.A., his current representative. All books and records

produced on audit were provided by Mr. Grosso and all meetings with the auditor took place at Mr. Grosso's office. When Mr. Zambardi received the notices of determination he immediately presented them to Mr. Grosso for further action.

On October 19, 1989, Air Flex and Emil Zambardi, as officer, filed a petition with the Division of Tax Appeals seeking a hearing on the merits of the case. The Division of Taxation, by its Law Bureau, filed an answer to the petition on January 8, 1990 affirmatively raising the issue of timeliness and indicating that petitioners had not requested a conciliation conference or a hearing in a timely manner.

ADDITIONAL FINDINGS OF FACT ON REMAND

The affidavit of Michael J. Sampone, Tax Audit Administrator of the District Office Audit Bureau, sworn to July 13, 1990, described the procedures followed in preparing and mailing notices of determination. In describing the mailing of the notices, Mr. Sampone noted the following:

"7. The staff member writes the 'certified control number' for each address on the Certified Mailing Record and deposits the Notices of Determination and Demand and the Certified Mailing Record in the Mail and Supply Section 'outgoing mail' basket located in the DOAB, from which they are picked up by an employee of the Mail and Supply Section and transported to the mail room.

8. After the Notices of Determination and Demand are accepted by the United States Post Office, the Mail and Supply Section returns a copy of the Certified Mailing Record, with the postmark stamp affixed thereto showing the date of mailing, to the DOAB with the attestation of employees of the Mail and Supply Section that the notices described were deposited in a branch of the United States Post Office, enclosed in sealed post paid envelopes. This signifies that the Notices of Determination and Demand have been accepted by the United States Post Office. The Certified Mailing Record is kept in the regular course of business in this office. Certified mailing receipts are not requested from the United States Post Office or recipients of notices."

Although the mail and supply clerk apparently failed to have a postmark affixed to the certified mailing record, the attestations on the reverse of Form AU-372.1 indicate that the other procedures were followed in delivering the notices herein into the custody of the United States Postal Service as described in Mr. Sampone's affidavit. All of the documentary evidence led Mr. Sampone to conclude that the notices were properly sent by certified mail to petitioners herein on January 27, 1989.

The attestations contained on the back of Form AU-372.1, mailing record, dated January 27, 1989, stated the following:

"Au-372.1 (5/78) (back)

'On JANUARY 27, 1989, I delivered all notices identified on the reverse of this sheet to the Mail and Supply Section of the Department of Taxation and Finance, Albany, N.Y., and there witnessed the sealing and stamping of the envelopes in which they were enclosed. Each such notice was enclosed in an envelope addressed to the taxpayer named therein, at the address shown on the notice.'

/s/ Karen Shea
Audit Division

Witnessed by: /s/ Pat Westfall
Mail and Supply Section

Dated: JANUARY 27, 1989

'On JANUARY 27, 19 , I deposited in a branch of the United States Post Office of Albany, New York all notices described above, all enclosed in sealed postpaid envelopes.'

/s/ C. Brennan
Mail and Supply Section

Witnessed by: /s/ T. D. Paley
Mail and Supply Section

Dated: JANUARY 27, 1989"

A second affidavit of Daniel D. Lafar, Principal Mail and Supply Clerk, sworn to July 27, 1990, supplements the Sampone affidavit with a discussion of the general office procedure for the delivery of outgoing mail to the United States Postal Service, indicating the same procedures outlined in the Sampone affidavit. After reviewing the documentation in this case, Mr. Lafar concluded that the notices herein were properly mailed to petitioners on January 27, 1989.

CONCLUSIONS OF LAW

A. This determination is being issued at the request of the Tax Appeals Tribunal and is limited to the issue of whether the evidence established the proper issuance of the notices of

determination on January 27, 1989. The Tribunal also has requested that the "apparent contradiction" between the affidavit of Michael Sampone and the Postal Service Form 3877 be resolved.

The affidavit of Michael J. Sampone, Tax Audit Administrator of the District Office Audit Bureau, described the procedure followed in preparing and mailing notices of determination. Part of the affidavit noted that an employee of the Mail and Supply Section "returns a copy of the Certified Mailing Record [Postal Service Form 3877 and AU-372.1], with the postmark stamp affixed thereto showing the date of mailing, to the DOAB with the attestation of employees of the Mail and Supply Section that the notices described were deposited in a branch of the United States Post Office, enclosed in sealed post paid envelopes" (Sampone affidavit, p. 2, ¶ 8). The affidavit also indicated that the DOAB employee who delivered the instant notices to the Mail and Supply Section was Karen Shea, a clerk under Mr. Sampone's supervision. She attested to the following on the back of Form AU-372.1:

"[that she] witnessed the sealing and stamping of the envelopes in which they were enclosed. Each such notice was enclosed in an envelope addressed to the taxpayer named therein, at the address shown on the notice."

A second attestation found on the back of Form AU-372.1 was that of "C. Brennan" of the Mail and Supply Section which stated the following:

"On JANUARY 27, 19 , I deposited in a branch of the United States Post Office of Albany, New York all notices described above, all enclosed in sealed postpaid envelopes."

/s/ C. Brennan
Mail and Supply Section

Witnessed by: /s/ T. D. Paley
Mail and Supply Section"

The affidavit of Daniel D. Lafar, Principal Mail and Supply Clerk, also delineated the procedures followed by the Division in its regular course of business.

Neither the Sampone nor the Lafar affidavits noted the omission of any procedure in the instant matter. However, it is clear that neither the Postal Service Form 3877 nor the AU-372.1 bore the postmark of the United States Postal Service. The issue becomes then whether the lack

of such a postmark is fatal. It is determined herein that it is not.

Where the Division has denied a taxpayer a conciliation conference on the grounds that the request was not timely, the Division is required to establish when it mailed the notice of determination (see, Matter of Malpica, Tax Appeals Tribunal, July 19, 1990, citing Magazine v. Commissioner, 89 TC 321; Trimble v. Commissioner, 57 TCM 1256; Southern California Loan Assn. v. Commissioner, 4 BTA 223, 224-225). A notice of deficiency is mailed when it is delivered to the custody of the Postal Service for mailing (see, August v. Commissioner, 54 TC 1535, 1538). The Division may prove the act of mailing by establishing its customary procedure for the mailing of such notices and by introducing evidence that such procedure was followed in this case (see, Cataldo v. Commissioner, 60 TC 522, 524, affd 499 F2d 550, 74-2 USTC ¶ 9533; see also, Matter of MacLean v. Procaccino, 53 AD2d 965, 386 NYS2d 111, 112; Matter of Kropf, Tax Appeals Tribunal, March 21, 1991; Matter of Novar TV & Air Conditioner Sales & Service, Inc., Tax Appeals Tribunal, May 23, 1991).

It must be noted that the absence of a postmarked Form 3877 is not fatal to the validity of a deficiency notice when the Division submits other documentary evidence or testimony to prove that the deficiency notice was timely mailed (Magazine v. Commissioner, *supra* at 326; Shuford v. Commissioner, 60 TCM 452, affd 937 F2d 609 [1991]; see also, MacLean v. Procaccino, *supra*).

In the instant matter, the Division submitted two contemporaneous attestations with the AU-372.1 mailing record which established the date on which the six notices herein were enclosed in postpaid wrappers, properly addressed to petitioners and placed in the custody of the United States Postal Service as January 27, 1989.²

It is held herein that these attestations, executed and witnessed contemporaneously with the mailing logs, supporting the procedures described in the affidavits of Messrs. Sampone and

²Although the year was omitted from the attestation of the Mail and Supply Section clerk, C. Brennan, it is clear from the date of the attestation of Ms. Karen Shea of the Audit Division immediately above and the date of Brennan's attestation that to infer any other year than 1989 would be inconsistent and contrary to common sense.

Lafar, add a great deal of weight to those documents and establish that the notices herein were mailed, i.e. issued, on January 27, 1989.

Although Mr. Sampone made the statement in the affidavit that one of the factors signifying that the notices "have been accepted by the United States Postal Service" is the postmark affixed to the mailing record, given the preceding discussion, it is not fatal that said postmark was omitted (see, Magazine v. Commissioner, supra; Shuford v. Commissioner, supra).

Furthermore, the affidavits and attestations establish that the employees responsible for the mailing substantially complied with the set procedure (T. J. Gulf v. New York State Tax Commission, 124 AD2d 314, 508 NYS2d 97).

B. The regulation at 20 NYCRR 4000.3(c) promulgated pursuant to Tax Law § 170(3-a)(b) provides, in part, as follows:

"Time Limitations. The request [for conciliation conference] must be filed within the time limitations prescribed by the applicable statutory sections for filing a petition for hearing in the Division of Tax Appeals, and there can be no extension of those time limitations."

The statutory time limitations referred to in the regulation are found within Tax Law § 1138(a)(1):

"Notice of such determination shall be given to the person liable for the collection or payment of the tax. Such determination shall finally and irrevocably fix the tax unless the person against whom it is assessed, within ninety days after giving of notice of such determination, shall apply to the division of tax appeals for a hearing, or unless the commissioner of taxation and finance of his own motion shall redetermine the same." (Emphasis added.)

Therefore, it was incumbent upon Air Flex and Emil Zambardi, as officer, to file the request for conciliation conference within 90 days of the issuance of the notice of determination. Since they failed to do so, and since no extension of the statutory period for filing is permitted, they failed to file a timely request and the dismissal of their request by the Bureau of Conciliation and Mediation Services was proper. (Tax Law § 170[3-a][b]; 20 NYCRR 4000.3[c].)

C. Petitioners' argument that the premature protest of the notices of determination was

"within 90 days after giving of notice" pursuant to Tax Law § 1138(a) is clearly in error. The Tax Appeals Tribunal discussed the matter thoroughly in Matter of Hagop Yeghukian (Tax Appeals Tribunal, March 22, 1990) wherein it stated as follows:

"The issue that is before us, whether a taxpayer's protest filed prior to receiving a Notice of Determination is an adequate protest, has been settled by the Appellate Division decision in Matter of West Mountain v. Department of Taxation and Fin., (105 AD2d 989, 42 NYS2d 140, aff'd 64 NY2d 991, 49 NYS2d 62). The court in West Mountain held that a timely filed letter protesting a statement of proposed audit adjustment could not supplant the statutory requirement that a petition for a hearing be filed within 90 days after the issuance of the Notice of Determination. Under West Mountain, the petitioner's letter protesting the Consent to Fixing of Tax, filed prior to petitioner's receipt of the Notice of Determination, could not function as a petition of the notice. This conclusion is supported by Tax Law § 1138(c) and by the function of the Consent to Fixing Tax stated in its legislative history."

D. Petitioners argue that the Division's failure to obtain a properly executed power of attorney was directly related to their failure to timely file a request for a conciliation conference. The flaw to which petitioner objects is the failure by the notary public to properly acknowledge the signature of Emil Zambardi as president of Air Flex. Additionally, Emil Zambardi did not date his signature. The notary public did sign her name and date it and affixed her notary public stamp.

The Commissioner's regulations governing the form of the power of attorney are found at 20 NYCRR 600.5(c) and provide as follows:

"(c) Acknowledgment. The power of attorney must be acknowledged before a notary public or, in lieu thereof, witnessed by two disinterested individuals."

This provision is consistent with the statute prescribing a short form general power of attorney found in the New York General Obligations Law § 5-1501. That section provides that the execution of the short form power of attorney must be duly acknowledged by the principal in the manner prescribed for the acknowledgment of a conveyance of real property. New York Real Property Law § 309 provides examples of such acknowledgments and the Power of Attorney (corporate) formerly found on "Form DTF-14.1 (10/84)" is in substantial agreement with those examples. Additional support for the propriety of this acknowledgment is found in New York General Construction Law § 11.

A power of attorney is a written authorization to an agent to perform specified acts on behalf of his principal, which acts, when performed, have a binding effect upon the principal. It is an instrument by which the authority of one person to act in the place instead of another as attorney in fact is set forth. It is a mere contract of agency, that is, an authorization by a principal for the accomplishment on his behalf of a particular purpose or the performance of a particular act. (See 2 NY Jur 2d, Agency, § 62.)

Given the facts and circumstances of this matter, and from the credible testimony of Emil Zambardi, president of Air Flex, it is clear he entrusted full authority to Anthony L. Grosso, C.P.A. to represent Air Flex before the Department of Taxation and Finance in connection with this proceeding. All books and records produced on audit were provided by Mr. Grosso and all meetings with the auditor took place at Mr. Grosso's office. When Mr. Zambardi received the notices of determination, he immediately presented them to Mr. Grosso for further action. From all of the evidence, it is clear that Mr. Zambardi believed he had appointed Mr. Grosso as his legal representative in this matter and all his actions were consistent with and ratified such authorization.³

Even if the power were found to be invalid, Mr. Zambardi was properly served notices of determination, which he acknowledged under oath. Therefore, he was obligated to challenge the assessments within 90 days as clearly stated on the notices. Since he did not do so, the determinations were considered final.

³It is noted that the petition for the hearing in this matter was filed by Mr. Grosso and executed by him as well. Therefore, if it were held that the power was invalid, the petition would be a nullity and petitioners would lose their entitlement to this hearing.

E. The petition of Air Flex Custom Furniture Inc. and Emil Zambardi, as officer of said corporation, is dismissed.

DATED: Troy, New York

10/10/91

ADMINISTRATIVE LAW JUDGE